JD(SF)–58–05
Libby, MT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

MARCOR REMEDIATION, INC.

and

Cases 19–CA–29398
19–CA–29414

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 400, AFL–CIO; LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 1334, AFL-CIO; UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL NO. 28.

Richard Fiol, Atty., NLRB Region 19,
Seattle, WA, for General Counsel.

Christopher J. Murphy, Atty., with
Michael E. Lignowski, Atty., on the brief,
Saul Ewing LLP, Philadelphia, PA, for Respondent.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. This case presents the following issues. First, whether certain statements made by Respondent's supervisors and agents during a representation election campaign violated Section 8(a)(1) of the National Labor Relations Act (Act). And second, whether Respondent violated Section 8(a)(1) and (3) of the Act by failing to recall Anthony E. (Tony) Brown from layoff. For reasons explained below, I have concluded that one of the statements alleged in the complaint did not violate the Act but the other statements alleged did. In addition, I have concluded that Respondent violated the Act by not only failing to recall Brown but also by laying him off on September 3 in the first place.

The labor organizations listed in the caption (Unions or Charging Parties) filed the charge in 19–CA–29398 against Marcor Remediation, Inc. (Respondent or Company) on September 1, 2004.[1] They amended the charge on November 26 and December 22. The Charging Parties filed the charge in 19-CA-29414 on September 8 and amended that charge on October 12 and again on November 29. Based on those charges, the Regional Director for Region 19 issued a consolidated complaint on January 21, 2005, alleging that Respondent's supervisors and agents violated Section 8(a)(1) by certain statements made to employees, and that Respondent violated Section 8(a)(1) and (3) by failing to recall Brown in mid-September.

I conducted the hearing at Libby, Montana, on March 1 and 2, 2005. During the hearing, the parties were afforded a full opportunity to be heard, to call, examine, and cross-examine

[1] Dates in this decision refer to the 2004 calendar year unless shown otherwise.

witnesses, and to introduce relevant documentary evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a Maryland corporation with an office and place of business in Libby, Montana, is engaged in business as an asbestos removal and abatement contractor. During the twelve-month period prior to the issuance of the complaint, Respondent received gross revenues valued in excess of $500,000, and purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of Montana.

II. Alleged Unfair Labor Practices

A. Overview

From the 1930s until 1990, several owners operated a large vermiculite mine near Libby in northwestern Montana. For the last 30 years of operation, the W. R. Grace Company owned and operated the mine. It closed following a determination that the mining and processing of the vermiculite resulted in the release of tremolite asbestos fibers, a rare, toxic substance. This discovery led the U.S. Environmental Protection Agency (EPA) to take responsibility for the cleanup of the area pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, commonly known as the Superfund.

The Volpe Center of the U.S. Department of Transportation (Volpe) provides engineering and remediation support to the EPA for the removal and disposal of the asbestos-contaminated material at Libby. Volpe in turn contracts with various contractors specializing in work of this type, including the Respondent, for the removal and disposal of the contaminated materials. Although Respondent has had contracts directly with Volpe in the past, at times relevant to this case, it operated in the Libby area as a subcontractor for Soil and Land Use Technology, Inc. (SaLUT), Volpe's general contractor at Libby in 2004.[2] In addition, Volpe engaged CDM, an architectural and engineering consultant, to provide the on-site inspection and monitoring of the work performed by the various remediation contractors and to perform the home investigations that preceded the preparation of work plans. Tr.23: 6-13.[3]

The terms of Volpe's contracts with SaLUT listed specific residences for cleanup and the type of cleanup activities required at each residence or commercial facility. In turn, SaLUT

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[2] Certain aspects of SaLUT's connection with Marcor at Libby do not suggest a typical arms-length relationship. Thus, some evidence shows that they jointly prepared bids on Volpe proposals. Tr. 275: 14–Tr.276: 2. Other evidence shows that SaLUT managers routinely directed Marcor employees and disciplined them. GC Exhibits 4 & 7. At least one Marcor employee saw no difference between the two. Tr. 69: 16-25.

[3] I base my findings in these first two paragraphs largely on the Regional Director's Decision and Direction of Election (D&DE) in Case 19-RC-14519 which issued on June 25. Respondent cited and quoted at length from that D&DE in its post-hearing brief. Respondent Brief: 3-5. In view of Respondent's reference, and as both documents are available to the public on the Board's web site, I take official notice of the D&DE as well as the Regional Director's Supplemental Decision (SD) in the same case that issued on August 30.

awarded particular task orders to its subcontractors, such as Marcor, who performed the required work. Tr.25: 15–20. Respondent's employees removed asbestos-contaminated insulation, dust, and soil from within and around area residences, and operated the disposal sites at a local landfill and the old mine. In performing this work, employees, virtually all certified as hazardous materials handlers, used mechanized equipment such as vacuum trucks, hydraulic excavators, skid steer loaders, tractors, and compaction equipment, as well as standard hand tools. D&DE: 3. Marcor received separate task orders providing for it to operate the landfill, the final repository for all of the contaminated insulation removed in the remediation process, and the mine, the final repository for the contaminated soil removed from around Libby. Tr. 26: 10–Tr. 27: 3; Tr. 32: 6–9. Marcor's residential task orders usually involved up to two months of work for its crews. If Marcor received no new task orders by the completion of existing work or seasonal conditions precluded work, employees would be temporarily laid off. Tr. 28: 6–Tr. 29: 4; Tr. 36: 11–13 and 23-25.

Marcor hired Tony Brown, the employee whose recall is disputed here, in August 2003. Prior thereto, Brown worked for another remediation contractor from 2001 until 2003. GC Exhibit 2. Over the course of his Marcor employment, which lasted slightly more than a year, Brown operated heavy equipment, drove trucks, setup and took down the containment structures used for residential cleanups, and served as a residential cleanup site supervisor as well as the landfill supervisor. Tr. 100: 5–13; Tr. 113: 11–12. Even though Marcor reduced its work force by temporarily layoffs through the winter months, Respondent employed eight to ten workers during the winter of 2003-2004 to perform interior work at residences including Brown who became the landfill supervisor in January.

Prior to 2004, most of Marcor's workers earned hourly rates in the mid-twenty range apparently based on the Davis-Bacon area rates for commercial construction tradesmen. However, by January 2004 the Libby clean-up operations began to concentrate almost entirely on decontaminating residential structures. As a result, EPA and Volpe solicited proposals from its Libby contractors for cost reimbursable contracts to perform the residential work at hourly rates payable under the Davis-Bacon laborer classification for the area. A local news article that appeared after the impact of this proposal request became known suggested that the EPA initiated this classification change because of the limited funds available for the Libby clean-up. GC Exhibit 3. Seemingly, no federal Davis-Bacon classification existed for hazardous material handlers or hazardous material handler equipment operators. In response to the solicitation for proposals, SaLUT and Marcor managers submitted a proposal based on a standard $14 per hour pay rate for technicians performing the residential work. Tr. 243: 8-Tr. 244: 24.

After Volpe accepted the SaLUT/Marcor proposal, a Marcor regional manager from California and Fergus Donaldson, Marcor's project manager for the Libby work also based in California, went to Libby to announce the change. Tr. 244: 25-Tr. 245: 6. On January 22, Marcor supervisor Juan Nuno notified employees to report to the Company's office before quitting time. At that meeting, Donaldson told the workers about a new classification system that would result in the reduction of their hourly pay rates by $10 to $11 per hour. Following the meeting, several Marcor employees discussed the wage reduction in the parking lot for over an hour. Tr. 121: 3-5.

A firestorm erupted over the pay cut announcement. Brown, who once served as the mayor of nearby Troy, Montana, and Vince Parker, an employee of another remediation subcontractor (Environmental Restoration), scheduled a protest meeting at the Libby City Hall Annex for February 5. Tr. 115: 4-10; GC Exhibit 2. They arranged for the mayor of Libby, the local state legislator, the county commissioners, the local press, and Libby area remediation

workers to attend. James M. Ranlett, Marcor's site superintendent, also attended. Tr. 114: 20–Tr. 115: 3; Tr. 116: 1-9.

During the protest meeting, the public officials spoke in support of worker efforts to have their wage rates restored, and promised to assist with a letter writing and phone call campaign. Brown spoke out attacking the reductions as a cost cutting measure because it called for large worker sacrifices while officials did nothing to curb costly abuses by the managers and professionals engaged in the clean up work who, he claimed, used government equipment and work time for their own personal purposes. 122: 23–Tr. 123: 6. The workers elected Brown and Parker as their representatives in connection with community efforts to restore their wages to their former levels. Tr. 115: 11–19; Tr. 116: 10–16. A local newspaper reported that an Operating Engineers agent who attended had urged employees to organize. GC Exhibit 3.

At the close of the meeting, the union representatives in attendance introduced themselves to Brown and discussed organizing a union with him. Brown made no immediate commitment but over the next few weeks he met union organizers for lunch on a couple of occasions. Tr. 124: 17-Tr. 125: 14. During the lunches Brown discussed the results of his research into various aspects of the wage rate decrease. The union agents told Brown about "options and alternatives" available to the employees. Tr. 126: 1–7.

In early April, Ranlett and Brown attended a work-related refresher course together. During a break in the instruction, Ranlett spoke to Brown about contacting the newspapers and public officials concerning the wage cut. He told Brown if employees wanted their wages back, he needed to "back off." Ranlett's admonition caused Brown to go to the local newspaper to request that it not quote him about managers using government equipment and funds for their personal uses. Tr. 121: 8–Tr. 123: 16. In addition, Brown made an unsuccessful effort of his own to obtain a favorable wage and classification determination from the Department of Labor.[4] Tr. 126: 13-24.

Later in April, Brown finally decided that unionizing would be a more beneficial approach so he contacted the Unions about organizing the employees. Tr. 126: 13-Tr. 127: 13. During the ensuing organizing effort, Union agents held meetings with employees nearly every Tuesday night. Brown promoted the effort by reminding employees of the meetings. Tr. 127: 24–25. He announced the meetings at the Company's morning meeting with employees in the presence of Ranlett and also Donaldson, if he happened to be in Libby, or after work as employees signed out at the Company office. Tr. 47:17-Tr. 48: 13; Tr. 207: 14-Tr. 208: 4. In addition, he had pro-union T-shirts printed and sold them to employees in the parking lot at the Company. On one occasion, Ranlett asked him where T-shirts came from and Brown explained that he had them made up at his own expense. Tr. 128: 1–15.

Meanwhile, Brown's job fortunes began to take a turn for the worse. On April 29, Brown, still the landfill supervisor, received a citation (known as a "Site Safety and Health Officer's Incident Report") issued by John Veitch, SaLUT's site safety and health officer. The incident report, based on an observation by "a CDM representative," states that Brown had failed to wear a Powered Air-Purifying Respirator (PAPR) while working within the "contaminated area of

[4] Shortly after the community protest meeting, Marcor partially restored employee wages by agreeing to apply a state wage rate determination for work of this type that provided for an hourly rate of $14.50 per hour plus $5.10 per hour for fringe benefits. In May or June, Volpe approved the reimbursement of Marcor for payment of this rate. It has been applied on all subsequent task orders. Tr. 243: 8-Tr. 246: 4.

the landfill." GC Exhibit 4. The report also states that Brown "was pulled from the contaminated zone and instructed to don the appropriate respirator before returning to work."

According to Brown, three types of masks were available for use at the landfill, a half-face, a full face, and the PAPR. Brown asserted on the incident report and at the hearing that no requirement existed prior to that time specifying the mandatory use of the PAPR respirator in landfill areas other than inside the dome where trucks unloaded contaminants vacuumed from residences. Instead, Brown claims, employees, including Ranlett, commonly used the half-face respirator while in areas outside the dome. At the time, according to Brown's uncontradicted testimony, he was working outside the dome repairing pipes on a water storage tank.[5] Moreover, Brown asserted that the same CDM employee earlier attached a contamination monitor to him without saying anything about his use of an inappropriate respirator. Following this incident, a notice containing the requirement for the use of the PAPR respirator was posted at the landfill. Tr. 129: 3–Tr. 131: 5.

On May 19, Gregory Parana, a CDM employee in Libby, observed certain operations inside the landfill dome, also referred to as the misting tent. The next day Parana e-mailed Courtney Zamora, the principal Volpe agent in Libby, listing five specific health and safety problems he observed during his inspection. Respondent's Exhibit 3. They included: (1) employees failed to use a ladder to remove and replace the flange cover on the vac box; (2) employees using a loader bucket to remove remnant material from the vac box; (3) the exhaust relief hose had not been used on a particular truck causing a significant build up of diesel exhaust in the dome; (4) negative air machines blocked the emergency exist; and (5) a gas monitor used to measure oxygen, CO, and LEL had not been operated during a dump. The e-mail recites that Parana spoke to Brown about the problems and when he paid a return visit the following day "[a]ll items noted on 5/19/04 were addressed by the contractor except the negative air machines continue to obstruct the emergency exists." The e-mail then added that during his May 20 visit, Parana observed an employee wearing eyeglasses under his respirator that obstructed the seal. Parana reported that he notified SaLUT of the problem and advised that the employee be removed from the "exclusion zone immediately."

Zamora requested a response in an e-mail forwarding Parana's report to Stacy Zimmerman, SaLUT's project manager, and Donaldson on May 24. Although Zimmerman showed the e-mail to Brown, no evidence shows what action, if any, the managers at SaLUT or Marcor took. However, Brown asserted that Ranlett and supervisor Nuno installed the negative air machines at the particular location described in the e-mail and that he questioned Parana about the appropriateness of the location. Later, they were moved. Tr. 191: 4-Tr. 192: 22.

Zimmerman tacitly criticized Brown in a "Site Manager's Incident Report" dated May 20 dealing with the eyeglasses/respirator incident referred to in Parana's report described above. Zimmerman's incident report states that Marcor employee Keith O'Bleness had been removed from the work area at the landfill by a CDM representative for wearing standard eyeglasses under his respirator. The report noted that no lens kit normally used with that respirator was available. O'Bleness' regular eyewear, according to the report, "causes the seal between the worker's face and the [PAPR] mask to be broken." It goes on to state that the worker "was removed from the work area and warned of the seriousness of the infraction" and that the on-site supervisor (Brown) "was also informed that upon noticing such problems, the worker should have been required to leave the area." GC Exhibit 7.

[5] By contrast, the incident report states that Brown was engaged in burying ACM bags.

Seemingly, Marcor ordered an approved lens kit for O'Bleness' use when required to wear the PAPR respirator but it could not be provided before June. In the meantime, O'Bleness received occasional assignments at the landfill where employees had to wear the PAPR respirator. Initially, O'Bleness attempted to work at the landfill without wearing his glasses but, purportedly, he would get dizzy when he worked without them. As a result, he began wearing his regular glasses. Tr. 135: 11-13. He claims to have told Ranlett about this practice.

Upon learning of his landfill assignment on May 20, O'Bleness again asked Ranlett about his lens kit and learned that it still had not arrived so he admittedly pulled the respirator on over his regular glasses and began work. Tr. 56: 11-Tr. 57: 3. When Parana noticed O'Bleness' glasses under the respirator, he summoned Zimmerman, a SaLUT manager, who removed O'Bleness, a Marcor employee, from the area. Tr. 57: 13-24.

Brown asserts that he never observed O'Bleness, whom he described as an inexperienced landfill worker, with his glasses on under his respirator on May 20. However, he overheard O'Bleness ask Ranlett during the morning meeting for a respirator that would accommodate his regular glasses because of the dizziness he experienced when working without them. Tr. 135: 3-13; Tr. 136: 7-12. Ranlett told O'Bleness they did not have one and sent him to work at the landfill anyway. Tr. 136: 3-6.

Additional incidents involving on Brown occurred on June 3 and June 9. Both are described in a memorandum from Scott Supernaugh, CDM's onsite manager, dated June 22. Respondent's Exhibit 4: 2-3. As described in that memo, the Marcor landfill crew was scheduled to perform a surface vacuum of soil that day, a project apparently falling within the scope of a time and materials contract. Instead of starting the project immediately upon arriving at the landfill, Brown and the other two crew members did nothing until around around 8:30 a.m. when the CDM agent (identified by Brown as Parana, Tr. 221: 19-22.) arrived. According to the memo, the CDM staffer had to initiate the work "by delineating the removal zone . . . and recommended that set-up of the exclusion zone and contaminate reduction zone (CRZ) be completed by Mr. Brown and his work crew." At 11 a.m. the CDM staffer left in response to a call for oversight elsewhere. When the CDM staffer returned at 1:10 p.m., the CRZ still had not been established and the surface vacuuming did not get underway until 2:15 p.m. The memo concludes by accusing Brown of poorly supervising the work crew and failing to timely initiate the work. As a result, the memo states, excessive time and manpower were incurred.

The June 9 incident, which Donaldson labeled the more serious of the two, essentially amounted to a claim that a CDM overseer observed Brown sleeping on the job. Tr. 316: 21-Tr. 317: 5. According to Supernaugh's memo, the CDM representative observed Brown, purportedly assigned to work as a vacuum truck operator at a residential clean up site that day, sitting in his personal vehicle resting "with his eyes closed" when he arrived at 9:15 a.m. Supernaugh's report states that because Brown was neither within an acceptable distance to the vacuum truck nor in an alert condition, a "potentially hazardous condition" existed for Marcor employees in an attic if an emergency arose.[6] Respondent's Exhibit 4: 3.

[6] In fact, an emergency did occur two and a half months later when employee Dan Jenkins's arm was sucked into a vacuum hose while at work in an attic. It took nearly a minute to shut down the vacuum truck. An alert fellow worker cut into the hose with a knife to reduce the suction. Jenkins suffered ruptured blood vessels and swelling severe enough so that the emergency medical responders decided to "medivac" him over 80 miles to a Kalispell, Montana, hospital for observation. No disciplinary action resulted from this incident even though the accident report notes several crew errors. GC Exhibit 9.

According to Brown, he and his crew were instructed to go to the landfill on June 3 and wait for a CDM agent to arrive to delineate the removal zone. However, Brown claims that most of the delay on June 3 occurred when his crew interrupted the surface vacuuming project to retrieve a water tank and pump from inside the landfill dome, run them through the decontamination process and load them for use by a worker elsewhere, all in the absence of the CDM's Parana. Tr. 204: 7-16. In addition, he claims that his crew finished the project "within the assigned time" anyway and, although superintendent Ranlett asked him what had happened, he treated the whole matter very casually after Brown explained the reason for the interruption. Brown also asserted that Parana never bothered to ask about the reason the delay after he returned to the landfill in the afternoon. Tr. 221: 10-Tr. 221: 3.

Brown claims that June 9 incident occurred right before lunch after the vacuum truck had been shut down. By his account, the crew in the attic at that location had completed their work when the CDM agents arrived,. Both he and Cole Anderson, the site supervisor, were sitting in his vehicle out of the rain waiting for the crew to finish their showers inside a decontamination unit. When Brown and Anderson went to the office during the lunch period, Ranlett told Brown that CDM had called to report that he had been sleeping on the job. Brown denied the accusation as did Anderson. In fact, Brown emphatically denied ever sleeping on the job. Tr. 337: 10-Tr. 338: 10.

According to Donaldson, the Supernaugh memorandum caused him to insist that Ranlett issue a written warning to Brown. He denies soliciting the material contained in the memorandum and claims that he did not solicit efforts by Volpe, CDM, or SaLUT personnel to engage in careful surveillance of Brown's work or activities. Ranlett issued a written disciplinary report to Brown on June 25 with Donaldson listening on the telephone from his office in California. It amounted to a "final" warning that Brown might be terminated for any other "performance issues." GC Exhibit 8.

Meanwhile, on May 24, the Unions filed a petition for an NLRB election seeking to jointly represent the Marcor employees. As noted above, on June 25 the Regional Director for Region 19 issued a D&DE. The balloting for the initial election occurred in late July. Although it appeared that a majority of the employees had selected the Unions as their representative, the Regional Director set aside the first election after it became apparent that disputed ballots had been commingled and counted. SD 1. Another election was conducted in the fall but the Unions failed to achieve a majority status. Tr. 256: 15-Tr. 257: 21.

In late July, Brown was abruptly removed from his job as the landfill supervisor. Almost from the start of his tenure as the landfill supervisor, Brown requested, without success, that the broken grates on the decontamination pad in the landfill dome be fixed as, in his view, they constituted a safety hazard. By the time Donaldson visited the Libby project toward the end of July, this problem still had not been solved. Obviously exasperated, Brown approached Donaldson and told him, "[Y]ou need to get these grates fixed. It is a safety hazard and if you do not fix them, I am going to put a stop work on the landfill." The following day, Brown was demoted from his position as the landfill supervisor and reassigned to residential cleanup operating a vacuum hose. He never again worked as the landfill supervisor. Tr. 141: 1-Tr. 142: 13; Tr. 175: 15-17; Tr. 180: 23-Tr. 181: 13.

Donaldson asserted that Brown spoke to him about the broken landfill decontamination pads but claims that it took place later at a time when Brown was performing decontamination work on the mine road. Tr. 265: 21-Tr. 267: 14. I do not credit Donaldson's account because I find it improbable that Brown would have concerned himself with a landfill issue following his

removal as the landfill supervisor. Neither Donaldson nor Miller, Respondent's only witnesses, provided an explanation for Brown's removal from his position as the landfill supervisor.

B. Complaint Paragraph 5(a)

1. Relevant Facts

Complaint paragraph 5(a) alleges that Timothy Miller told employees that once the company entered into a bargaining agreement it could not talk to the employees anymore.

Miller, Respondent's senior vice president of operations and one of its four owners, conducted an employee meeting on July 13 at a local motel. During the first portion of the meeting, lasting about 45 minutes, Miller presented Marcor's standard ethics training as provided under Company policies. Following that, Miller told employees they could leave if they wanted but he would make himself available to answer any questions or address concerns they had about the upcoming NLRB representation election. Tr. 231: 23-Tr. 232: 8; Tr. 234: 20-Tr. 235:16.

When Miller discussed issues pertaining to the election and union representation, he occasionally referred to and read from the collective bargaining agreement the Company's counsel had been furnished by a representative of the Charging Parties. Tr. 238: 5–240: 1. O'Bleness, a Marcor employee since April, attended this meeting. He recalled Miller told employees to attend the union meetings and do what they could to make an informed decision. Miller also told the group that he had the union agreements there at the meeting and that the employees should feel free to look through them. Tr. 51:20–Tr. 52: 12. O'Bleness also remembered that Miller remarked that "once we sign a union contract . . . they would no longer be able to talk to us . . . [that] we would have to mediate through a union representative. They couldn't give us a rise on merit. That everything would have to be done the way the union said." Tr. 53: 9–16. During cross-examination, O'Bleness testified:

> "[O]nce we enter into a bargaining agreement or once we sign a union contract, that the company can no longer talk to the employees. Any raises, anything would have to go through the union. They couldn't give us raises on merit. Even disciplinary actions would have to be carried out through the union. That there would be a big difficulty in carrying out the day-to-day activities." Tr. 65 22–Tr. 66: 4.

Miller denied that he made the statement O'Bleness attributed to him to the effect that management would "no longer able to talk to employees" if they selected a union. However, Miller acknowledged that he spoke about and read from the "scope" portion of the collective bargaining agreement. Among other provisions, Miller read the standard one barring signatory employers from entering into any agreement "with employees either individually or collectively." Tr. 239: 13–Tr. 240: 17; Respondent's Exhibit 5: 6.

2. Further Findings and Conclusions

For purposes of this analysis, I credit on Miller's more precise and plausible account. However, the General Counsel's brief on this allegation seems to implicitly abandon the particular statement as cast in the complaint in favor of another portion of Miller's remarks as reported by O'Bleness on direct examination. Thus, rather than urging that the coercive character of Miller's remarks arises from the purported assertion that the employer would no longer be able to talk with employees after it signed a collective bargaining agreement as the

complaint avers, the General Counsel's brief argues the coercion in Miller's remarks springs from his alleged statement that "everything would have to be done the way the union said." Citing *Gissel,*[7] General Counsel asserts that this comment amounts to a prediction that lacks a foundation of objective fact and therefore is a "threat based on misrepresentation and coercion."

At the outset, I find Miller's credited remarks concerning the scope of the typical collective bargaining agreement would not be unlawful under existing case law. The Board holds that, without more, statements of this nature simply amount to a non–coercive explanation that the relationship between the employer and employee changes when employees select a representative. ***Ben Venue Laboratories,*** 317 NLRB 900 (1995).

In addition, I reject the odd *Gissel* theory advanced in the General Counsel's brief. The portion of the *Gissel* decision General Counsel cites in constructing this argument, 395 U.S. 618, does not pertain to each and every prediction an employer might make when communicating with employees. Instead, the relevant portion of *Gissel* confines itself to implications arising from actions "an employer may or may not take . . . *solely on his own initiative* for reasons unrelated to economic necessities and known only to him." (Emphasis mine.) By reading the cited *Gissel* language in its entirety and context, it becomes apparent that the Court's words simply do not apply to the portion of Miller's statement addressed by the argument in the General Counsel's brief. That is so if for no other reason than the fact that doing every thing the way the union wants would not be an action taken by the employer "solely on his own initiative." Accordingly, I will recommend dismissal of this allegation.

C. Complaint Paragraph 5(b)

1. Relevant Facts

These allegations pertain to threats purportedly made by site superintendent Ranlett. Paragraph 5(b)(i) alleges that Ranlett threatened employees in June 2004 that the company would bring in its own people from California if employees selected union representation. Paragraph 5(b)(ii) alleges a similar threat. General Counsel relies on testimony by Delores Jensen and Anthony Brown to support these allegations. Paragraph 5(b)(iii) alleges that Ranlett told employees in July 2004 that if employees selected a union, the company would lose jobs because it would not be able to bid competitively. General Counsel relies on testimony by O'Bleness and Brown to support this allegation.

Around 6:45 a.m. each workday, superintendent Ranlett conducted a safety meeting with employees before they scattered to their assigned tasks around Libby. During some of these meetings, Ranlett made incidental, negative references to the union organizing drive and, occasionally, handed out anti-union literature. Tr. 54: 15-19; Tr. 87: 18–20. Jensen remembered one occasion in late May or early June when Ranlett told employees that Marcor was not a union company and that they do not hire union employees. He added, according to Jensen's uncontradicted testimony, "[I]f we went union, that he would have to lay off people and hire another crew and, if that didn't work out, hire another crew, maybe bring up their crews from California to work." Tr. 80: 15–25; Tr. 90: 20-25. Brown also recalled an occasion during one of the morning meetings when Ranlett told employees that if the employees "were to go union," they would not have to hire locally because the Company could bring people in from California. Tr. 148: 6–11.

[7] ***NLRB v. Gissel Packing,*** 395 U.S. 575 (1969).

O'Bleness recalled that Ranlett told employees one morning in the last half of July that if the employees unionized Marcor "would have a more difficult time being competitive" and that the company "could possibly lose the contracts that [it was] bidding on." Tr. 54: 23–Tr. 55: 4. Brown remembered that Ranlett once said "[i]f we were to go union," the company would not be able to compete and the employees would not have jobs. Tr. 150: 2–3. As Ranlett did not testify, the accounts of Jensen, O'Bleness and Brown are uncontradicted.

2. Further Findings and Conclusions

Respondent's brief seems to suggest that I should discredit Jensen's recollection that Ranlett threatened to lay off the crew if they unionized because her pre-hearing affidavit, signed in November 2004, contains no reference to this statement. I decline the invitation to discredit Jensen on that ground. She testified with a straightforward, candid, and convincing demeanor. Brown, in effect, provided some corroboration for Jensen's uncontradicted account. Accordingly, without more, the mere absence of some particular event in a pre–hearing affidavit says little, if anything, concerning a witness' credibility. These affidavits grow out of person-to-person or telephone interviews conducted and controlled by a regional office investigator. Lay witnesses cannot be expected to have a thorough familiarity with the type of information an investigator might regard as significant and, with some frequency, the investigator's interview fails to address issues later incorporated in a formal complaint. Hence, pointing the finger at an employee witness for deficiencies in a pre-hearing affidavit should be done sparingly and when a far more substantial basis exists for concluding that the witness recently fabricated testimony given at hearing.

As I credit Jensen and Brown, I find Ranlett's remarks amounted to a threat that employees would be replaced, perhaps by employees imported from California, if they selection union representation. In addition, his further remark that Respondent did not hire union employees also served to create a coercive atmosphere. In view of these findings, I have concluded that Respondent violated Section 8(a)(1) as alleged in Complaint paragraphs 5(b)(i) and (ii).

The General Counsel contends that Ranlett's other statement about the effect of unionization on Respondent competitive position "reasonably and objectively could be viewed by employees as a threat" of adverse consequences. Respondent argues Section 8(c) protects Ranlett's statement.

Even though evaluating these types of statements often proves difficult, the task is not an impossible one. At least one authority recognizes that the "efforts of the Board and courts to find a consistent line separating threats from predictions reveal both the difficulty of the task and the inescapable elasticity of the *Gissel* guidelines." 1 Hardin & Higgins, ***The Developing Labor Law***, 130 (4th ed. 2001). The aspect of *Gissel* treating with the tension that often exists in the pre-election context between an employer's free speech rights and the employees' right of free association pertained to the facts and contentions made on behalf of the Sinclair Company in one of three cases the Court brought up and addressed in its seminal decision. Although the Court's *Gissel* guidelines receive frequent citation (even I have alluded to them above), the Court's application of its own guidelines to the Sinclair case facts provides significant insight into the Court's perceptions about the principles it established in that case. Thus, at 395 U.S. 619–620, the Court dealt with the Sinclair "prediction" this way:

> Equally valid was the finding by the court and the Board that (Sinclair's) statements and communications were not cast as a prediction of 'demonstrable 'economic consequences," but rather as a threat of retaliatory action. The Board

> found that (Sinclair's) speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a precarious financial condition; that the 'strike-happy' union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such a case would have great difficulty finding employment elsewhere. In carrying out its duty to focus on the question: '(W)hat did the speaker intend and the listener understand?' (A. Cox, Law and the National Labor Policy 44 (1960)), the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that (Sinclair) had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that it admitted at the hearing that it had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts. [Internal citations and footnotes omitted]

Mindful that the Court itself favored the likely perceptions of employees over the analysis of a detached rationalist, I deem it essential to adopt this posture as an analytical prerequisite in these situations. Elsewhere in *Gissel*, the Court noted that "any balancing of those rights [employer freedom of expression under Section 8(c) versus employee right of free association under Section 7] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." 395 U.S. 617. Because of this relationship, the *Gissel* Court made clear, free speech in the context of a union representation campaign differs from free speech in the context of a political campaign. 395 U.S. 617–618.

As found earlier, Ranlett unlawfully threatened to lay employees off if they chose a union to represent them. The retaliatory character of such a remark cannot be argued and undoubtedly sent a perilous message to employees concerning their job security. Later, when he also implied that employees might lose their jobs if the company became less competitive because its Libby employees chose to become unionized, Ranlett, just like the Sinclair's president, got the cart before the horse. In precisely the same sense the *Gissel* Court found that Sinclair' basic assumption for its propaganda lacked support because the union had not yet presented any proposals, no support exists for Ranlett's bare statement that the mere choice of union representation by employees would competitively disadvantage Respondent in acquiring future jobs at Libby. Any suggestion that employees, merely by selecting a representative, relinquish total control of their economic destiny to their representative amounts to little more than an unsupported myth often perpetrated by those unfamiliar with the day-to-day workings of most labor organizations. Given the role represented employees nearly always play in fashioning their own bargaining proposals, it would be extremely unreasonable to assume that they would insist on terms likely to put their employer out of business.

Factors peculiar to this case shed further light on the character of Ranlett's July remark. Despite his reference to job bidding, Ranlett's boss, project manager Donaldson, made it abundantly clear that jobs related to the Libby cleanup are not awarded on a strict low bidder basis at all. Donaldson described the job acquisition process in this fashion:

> I wouldn't call it a bidding process. In the past the way it's worked is the government issues what's called a Request for Proposal and the proposal involves putting together your performance capabilities of your company, your past history. You know, write ups on your -- or discussions on your health and safety program, your quality assurance program. That sort of thing that would be considered the technical proposal. And there'd be a business proposal which would list your mark up rates and there would be a technical evaluation and business evaluation of these proposals. So it's not a straight bid. It wasn't, to get these contracts, it wasn't the lowest price, because there wasn't really a price to give.

Furthermore, when Miller, one of the Company's owners, spoke to employees a few days earlier, he made no attempt to advance an argument that the Company would become uncompetitive if the employees selected union representation. In this organizing campaign, three local construction trade unions sought to represent Respondent's employees jointly, a fact which suggests employee representation would likely be more akin to the industrial union model as opposed to the craft union model. In those situations, less emphasis is typically placed on strict adherence to traditional construction craft lines, rules, and standards. Together, these factors render any speculation about the impact of unionization on Respondent's ability to obtain future work far outside the range of "objective fact" suitable for conveying a reasonable belief "as to demonstrably probable consequences beyond [the employer's] control" as *Gissel* requires for employer statements to be insulated by Section 8(c).

Respondent argues that Ranlett's remarks concerning competitiveness are similar to those made by the company president in the *Enjo Contracting* case.[8] I find that case factually distinguishable for several reasons. First, the employees already knew about the company's precarious economic position. Second, the company president's statements there were substantially more qualified (you "should think twice about joining the Union . . . [b]ecause the company isn't competitive." Later, he said "if the union get[s] in and start[s] to make demands, we wouldn't be able to compete with our competitors.") than Ranlett's unqualified assertions. Third, Ranlett was not in a position to assess the impact unionization on the company's competitive position. And fourth, the circumstances under which Respondent was awarded work differed substantially from the situation in the *Enjo Contracting* case.

In my judgment, Ranlett's statement to the effect that the selection of union representation would adversely affect Marcor's competitive position amounts to nothing more than subjective speculation designed to mislead and coerce employees by implying their employment could be jeopardized by the wrong choice in the NLRB election. Accordingly, I conclude that his July statement on competitiveness violated Section 8(a)(1), as alleged.

D. Complaint Paragraph 6

1. Relevant Facts

Complaint paragraph 6 alleges that Respondent failed and refused to recall Brown to work from a September 3 layoff because of his union or concerted activities.

Little dispute surrounds the core facts. By September, Brown worked at a truck decontamination site on the mine road. Tr. 150: 18-Tr. 151: 12. On September 3, Respondent laid off seven employees including Brown apparently after the completion of a particular task

[8] ***Enjo Contracting Co., Inc***., 340 NLRB No. 162 (2003).

order. This represented only a portion of Respondent's total work force. Although Ranlett purportedly selected those for layoff at this time, and later determined who to recall, Donaldson instructed him to include Brown in the group to be laid off and to recall Brown only after all others had been recalled because of his "egregious" safety record. Tr. 269: 3-Tr. 270: 4. Ranlett informed employees of the layoff in small group sessions at the end of the day. He told Brown's group that they had been selected for layoff based on their abilities. Tr. 156: 9-Tr. 157: 4. No evidence shows that Brown's safety record was discussed at his layoff.

By mid-September, Respondent acquired added work and recalled four of the seven. Tr. 43: 9-21. Two others, Keith O'Bleness and Stewart Spady, had already acquired work with other remediation contractors before the mid-September recall. O'Bleness declined Ranlett's recall offer for that reason; whether Spady ever received a recall offer is unknown. Tr. 58: 3; Tr. 73:11-Tr. 74: 7. Although Respondent stipulated that Brown "had the requisite level of skill and ability to perform all the tasks associated with hazardous material handler and the hazardous material equipment operator job classifications," Respondent appears to have recalled some lesser qualified employees instead of Brown. Tr. 81: 1-18; Tr. 102: 3-10; Tr. 223: 21-Tr. 226: 3.

2. Further Findings and Conclusions

In ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established the analytical model to be used for resolving adverse action cases that turn on the issue of employer motivation. Later, the Supreme Court approved the *Wright Line* test. ***NLRB v. Transportation Management Corp***., 462 U.S. 393, 401 (1983). *Wright Line* applies to the issues pertaining to Brown's recall.

Under the *Wright Line* test, the General Counsel has the burden of persuading the fact finder that the employee's protected conduct, *in fact*, amounted to a motivating factor for the employer's action. ***Webco Industries***, 334 NLRB 608, fn. 3 (2001). To meet this burden, the General Counsel must establish certain essential elements of a discrimination case by a preponderance of the evidence. These elements include, (1) showing that the employee engaged in protected activity, (2) proving that the employer knew about that protected activity, and (3) establishing that the employer harbored hostility toward the employee's protected activity. ***Best Plumbing Supply***, 310 NLRB 143 (1993).

If the General Counsel establishes that the employee's protected activity motivated the employer's adverse action, the burden of persuasion then shifts to the employer to establish, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in the protected conduct. 334 NLRB fn. 3. Because the employer bears the burden of persuasion, not merely production, it cannot simply recite a legitimate reason for the discharge. Instead, the employer must "persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." ***Roure Bertrand Dupont, Inc.,*** 271 NLRB 443 (1984).

At the outset, I find the issues concerning Brown's layoff and recall inseparable in view of Donaldson's testimony that he specifically directed Ranlett to include Brown in the September layoff and to recall him only after all other laidoff employees had been recalled because he purportedly compiled an "egregious" safety record. Based on this assertion, it would be irrational to conclude that Respondent's motive for failing to recall Brown pertained to his union activity while the motive for his layoff in the first place pertained to something else. In situations where the General Counsel fails to allege certain conduct as unlawful, the Board unquestionably may find and remedy an unfair labor practice even if it is unalleged provided the matter is

closely related to other complaint allegations and has been fully and fairly litigated. ***Alexander Dawson, Inc. v. NLRB***, 586 F.2d 1300, 1304 (9th Cir. 1978); ***Monroe Manufacturing***, 323 NLRB 24, 26 (1997). Where, as here, Donaldson lumped the explanation for Brown's layoff and lack of recall together, I find Brown's layoff has been fully and fairly litigated.

General Counsel presented considerable evidence of Brown's protected activity and Respondent's knowledge of his activities. That evidence demonstrates without contradiction that Brown acted promptly after the wage cut announcement to become one of the principal organizers of the community protest meeting as well as the subsequent actions flowing from that meeting. Employees in attendance at the meeting elected Brown as one of their two spokespersons. Thereafter he engaged in several efforts seeking to obtain a modification of the classification determination that drove the wage reduction initially. Brown subsequently aligned himself with the union organizing campaign. In that connection, he openly sold T-shirts promoting unionization and regularly urged employees to attend the weekly union meetings, both in Ranlett's presence. When Miller opened the July 13 meeting up for employees to ask questions, Brown led off by pressing Miller for an explanation about the wage reduction. Clearly, over the six-month period following the February wage reduction announcement, Brown remained a vocal critic of that action. As a part of his campaign, he also denounced various managers and professionals associated with the Libby clean-up for misusing the accoutrements of their positions supported by public funds while workers' suffered deep wage cuts.

Respondent conceded in its brief that General Counsel has firmly established the elements of activity and knowledge required under a *Wright Line* analysis. Respondent Brief 13, fn 8. However, Respondent vigorously contends that this record contains insufficient evidence of animus to support the General Counsel's burden. I disagree. To be sure, Miller, who apparently made but one brief appearance in Libby following the February announcement, urged employees to attend the union meetings, get the facts, and make up their own minds about unionization. But even Miller opposed unionization. Other uncontradicted evidence shows that in early April Ranlett privately warned Brown to curtail his public claims of misconduct by managers and professionals in connection with his concerted activity related to the reclassification and pay rate reduction. Following that warning Brown became the subject of a series of questionable safety and production write-ups unlike anything he had received in the past. Moreover, Ranlett had free reign to carry on a regular anti-union dialogue with employees some of which involved unlawful threats and other coercive statements that amply demonstrate extreme animus toward the activity Brown openly promoted.

Based on the foregoing, I find General Counsel clearly established the essential elements of a discrimination case under the Act. In addition to the foregoing, another factor lends substantial support for an inference that the decisions pertaining to Brown's layoff and recall resulted from his protected activity. Thus, even though Ranlett told employees that their abilities controlled their selection for layoff and would control their recall, Respondent retained several newly-hired, inexperienced employees, and later recalled employees with substantially lesser skills than Brown.

I find Donaldson's assertions that he gave specific directions to Ranlett that Brown should be included in the September 3 layoff and recalled last because of his so-called egregious safety record unconvincing. To be sure, Respondent produced paper work showing Brown had been the subject of safety issues raised by CDM representatives. And, in its brief, Respondent argues that I should not credit Brown where his testimony conflicts with that of Miller or Donaldson. However, that argument about Brown's credibility begs the question. Even though I have some reservations concerning Brown's credibility in connection with certain specific events, the difficulty with Respondent's case lies not in contradictions between Miller or

Donaldson's testimony and Brown's but in the multitude of unrebutted assertions by Brown, particularly as they related to exchanges between Ranlett, Brown and others.

For example, Brown's claims, in effect, that the April 29 write-up about his failure to wear the proper respirator came as a bolt out of the blue. Not only does he claim that the CDM agent overlooked his respirator when he emerged from the change room that very day, he further asserts that even Ranlett wore the same type of respirator that he wore on that day when outside the landfill dome. In the absence of any evidence whatsoever to the contrary, I credit Brown on this point and conclude that this write up represented either a change in policy at the landfill or a change in the standard of enforcement from that which previously existed.

Similarly, I find the June 9 write up — the other "violation" Donaldson cited in making his conclusions about Brown's safety record — unconvincing for several reasons. Although Donaldson denies that he solicited this information, Supernaugh's memo and the Zamora's e-mail transmitting it contain highly unusual oddities. Thus, Zamora stated in his e-mail to Zimmerman that he had requested CDM to submit memos when significant issues arise because of "several discussions at the daily close out meetings regarding substandard work performance and health and safety concerns." On the other hand, the first paragraph of memo attached to Zamora's e-mail strongly suggests that Supernaugh initiated the substandard performance reports. Moreover, Zamora's e-mail implies some recent events triggered Volpe's request that "CDM . . . begin submitting memos when significant issues arise." Yet, Supernaugh's memo about Brown dealt with incidents that were already two weeks old in one instance and three weeks old in another. No evidence shows that Supernaugh submitted a report dealing with any other incident or any other employee even though Zamora's e-mail implies that several incidents had been discussed at recent daily close out meetings. In sum, these internal peculiarities cause me to conclude that this documentation is highly suspect.

Moreover, I credit Brown's claim that the CDM brought the June 3 and the June 9 incidents to Ranlett's attention on the very day they purportedly occurred and that he promptly asked Brown for an explanation. The fact that no disciplinary action occurred until Donaldson intervened to initiate it over three weeks later strongly suggests, as Brown claims, that Ranlett viewed the landfill matter casually and accepted his explanation about the so-called sleeping-on-the-job charge.

Finally, other disparities distract from the persuasiveness of Respondent's case. Thus, the fact Marcor took no disciplinary action when the far more serious August incident occurred that resulted in Jenkins' injury suggests the lack of an even-handed policy when compared to the treatment accorded Brown. In addition, O'Bleness' assignments to landfill when it was known that he lacked proper eyewear suggests that Respondent applied a far less strict safety standard toward him than it came to expect of Brown. Moreover, Brown's credited claim that Ranlett told employees his decisions about laying employees had been based on their abilities and their recall would be determined by the same factor does not square with Donaldson's emphatic assertion that he specifically targeted Brown for layoff because of his poor safety record, a fact Ranlett failed to mention to Brown. For the foregoing reasons, I conclude that the explanations offered by Respondent for Brown's layoff on September 3 and its failure to recall him later that month are a pretext.

The fact that Respondent advanced pretextual reasons for laying Brown off and its subsequent failure to recall him lends further support for the conclusion I have reached that Respondent's motive for these actions sprang almost entirely from its hostility toward his outspoken activities protesting the reclassification and wage reduction as well as his strong public support for the union organizing effort. ***Holo-Krome Co. v. NLRB***, 954 F.2d 108, 113

(2nd Cir. 1990) (a fact finder may consider the explanation provided by the employer for an adverse action in assessing whether the General Counsel has met his burden of persuasion.) Having found Respondent's motive for its adverse actions against Brown in September to be unlawful, I conclude that both Brown's layoff on September 3 and Respondent's failure to recall him later that month violated Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening to lay employees off and replace them with employees from elsewhere if they selected a representative for collective bargaining purposes, by telling employees that it did not hire union employees, and by implying that employees would have less work if they merely selected a bargaining representative because it would be less competitive.

4. Respondent has violated Section 8(a)(3) and (1) by laying off Anthony Brown on September 3 and by failing to recall him for available work in September 2004.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent must offer Anthony Brown reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and benefits and make him whole for any loss of earnings and other benefits. Backpay should be computed on a quarterly basis from the date of his layoff to the date of an appropriate offer of reinstatement, less any net interim earnings, as prescribed in ***F. W. Woolworth Co.***, 90 NLRB 289 (1950), plus interest as provided in ***New Horizons for the Retarded***, 283 NLRB 1173 (1987). Respondent must further expunge from its records any reference to Brown's September 3 layoff and notify him in writing that such action has been taken and that any evidence related to that layoff will not be considered in any future personnel action affecting him. ***Sterling Sugars, Inc***., 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

[9] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the Board will adopt these findings, conclusions, and recommended Order as provided in Section 102.48 of the Rules, and all objections to them shall be deemed waived for all purposes. I deny all pending motions inconsistent with this Decision and recommended Order.

ORDER

The Respondent, Marcor Remediation, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Threatening to lay employees off and replace them with employees from elsewhere if they selected a joint representative comprised of the International Union of Operating Engineers, Local No. 400, AFL-CIO, Laborers International Union of North America, Local No. 1334, AFL-CIO, and United Brotherhood Of Carpenters & Joiners Of America, Local No. 28, to represent them for collective bargaining purposes.

b. Telling employees that it does not hire union employees.

c. Coercing employees by implying that they would have less work if they selected a bargaining representative because Respondent would become less competitive.

d. Laying employees off and avoiding their recall them because they engage in union or concerted activities protected by Section 7 of the Act.

e. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer Anthony Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

b. Make Anthony Brown whole for any loss of earnings and other benefits suffered as a result of his September 3, 2004, layoff as described in the in the remedy section of this decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the Anthony Brown's September 3, 2004, layoff, and within 3 days thereafter notify him in writing that this has been done and that his September 2004 layoff and the failure to recall him thereafter will not be used against him in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its office and place of business in Libby, Montana, copies of the attached notice marked "Appendix."[10] Copies of the notice, on

[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased its operations at Libby, Montana, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2004.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: August 24, 2005, at San Francisco, CA.

_____
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten to lay our employees off and replace them with employees from elsewhere if they selected a joint representative comprised of the International Union of Operating Engineers, Local No. 400, AFL-CIO, Laborers International Union of North America, Local No. 1334, AFL-CIO, and United Brotherhood Of Carpenters & Joiners Of America, Local No. 28, to represent them for collective bargaining purposes.

WE WILL NOT tell our employees that we do not hire union employees.

WE WILL NOT coerce our employees by implying that they would have less work if they selected a union representation because their doing so would make us less competitive.

WE WILL NOT lay employees off and avoid recalling them because they engage in concerted activities protected by Section 7 of the Act.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you for exercising your rights guaranteed by Section 7.

WE WILL, within 14 days from the date of the NLRB's Order, offer Anthony Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Brown whole with interest for any loss of earnings and other benefits suffered as a result of his September 3, 2004, layoff.

WE WILL, within 14 days of the NLRB's order, remove from our files any reference to the Anthony Brown's September 3, 2004, layoff, and, within 3 days thereafter, **WE WILL** notify him in writing that this has been done and that his layoff will not be used against him in any way.

MARCOR REMEDIATION, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078

(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.